THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CORAM: (HON. S.T. MANYINDO DCJ, HON. S.G. ENGWAU J.A, HON. A. TWINOMUJUNI J.A)

CIVIL APPEAL NO.50 OF 1997

VINCENT MUKASA ……APPELLANT

VERSUS

NILE SAFARIS LIMITED…… RESPONDENT

(An appeal from the judgment and decree of the High Court (Mukanza J.) in Civil Suit No. 870 of 1995)

JUDGEMENT OF TWINOMUJUNI J.A

This is an appeal from the judgment and decree of the High Court sitting at Kampala whereby the appellant's suit for recovery of his motor car registration No. 193 UBH or its value of shs. 7..500,000/= was dismissed with costs.

The facts which gave, rise to this suit are briefly as follows. On 30th July 1995 the appellant bought a Toyota Carina Reg. No. 193 UBH Engine No. 3A-5342608 from Central Auto Spares at a price of shs. 7,500,000/=. Shortly afterwards he entered into a hire agreement with the respondent which provided as follows: -

"RE: VEHICLE HIRE AGREEMENT BETWEEN M/S NILE SAFARIS AND VINCENT MUKASA

Nile Safaris Ltd hereby agree to sub-hire vehicle reg. No. UBH 193 on self drive basis for 1st August days from 30 to 30th Aug. (sic) The vehicle will be returned to Vincent by Nile Safaris in the same condition it was taken in.

PAYMENT: 500,000

DEPOSIT:

BALANCE:

The driver of vehicle must have a valid driving permit and in case of accident, he must report to

police within 24 hours.

Sign. ……..

NILE SAFARIS

Sign…….

VINCENT MUKASA”

On 14th August 1995, the respondent sub-hired the vehicle to Vocational Tours & Travels, a company which lets out vehicles to its clients on self drive basis. There is no agreement on record to show on what basis the respondent released the vehicle to Vocational Tours and Travels. On the same day Vocational Tours and Travels sub-hired the vehicle to one Sam Nyeko who was to return the vehicle on 16th August 1995 at 6.p.m. Sam Nyeko never returned and has since vanished with the vehicle

By 8th September 1995 the respondent had not returned the vehicle to the appellant but they told him on that day that the vehicle had been stolen. He could not believe this and so he instructed his lawyers to demand for the vehicle or its value. Accordingly the suit was filed in the High Court.

In the High Court the learned trial judge made three main findings: -

(i) That as the suit was based on contract, the appellant could not recover in conversion and detinue.

(ii) That the appellant made a false claim when he filed the suit with full knowledge that the subject matter had been stolen.

(iii) That the undertaking to return the vehicle by the respondent had been frustrated by the theft of the vehicle.

The learned trial judge therefore dismissed the suit. Hence this appeal.

Before us the appellant relied on the following grounds of appeal: -

1**.** That the learned trial judge erred in law and fact when he failed to hold that the respondents act of transferring possession of the appellants vehicle to a third party without the appellants consent or knowledge was outside the terms of hire agreement and amounted to conversion.

2. That the learned trial judge erred in law and fact when he held that the respondent was not

liable in conversion and detinue merely because the appellant was purportedly aware that the vehicle (subject matter of the suit) was stolen from the third party.
3. That the learned trial judge misdirected himself or failed to properly evaluate the evidence when he held that the appellant knew the vehicle was stolen whereas the appellant admitted that he was informed but did not believe the vehicle was stolen.
4. That the learned trial judge erred in law and fact when he held that the respondent was not liable because the Hire Agreement was frustrated by theft of the vehicle whereas the respondent willfully parted possession thereof without appellants consent.

His prayer is that the appeal be allowed with costs, judgment of the trial court be set aside and an order against the respondent for the payment of U.Shs. 7,500,000/= and general damages for conversion and/or detinue be substituted therefore.

The main argument made by Mr. Peter Nkuruziza, learned counsel for the appellant, was that the hire agreement only authorized the respondent to use the vehicle on a self-drive basis, which meant that himself or his agent would drive the vehicle. It did not authorize him to sub-hire the vehicle to strangers as was done in this case. In so doing the respondent became guilty of conversion and the alleged act of theft occurred when conversion had already been committed. He argued that in law, the appellant was entitled to damages not only for .breach of contract but also in conversion and detinue.

Mr. Nkuruziza also submitted that subsequent knowledge that the vehicle had been stolen did not make any difference, since the knowledge occurred after the act of conversion.

Learned counsel for the respondent Mr. Muhwezi submitted chat there was nothing in the hire agreement to prevent the respondent from sub-hiring the vehicle to other people provided the driver had a valid driving permit. He further submitted that the agreement provided that in case of an accident, all the respondent had to do was to report to police within 24 hours. He submitted that in this case there was an accident when a theft occurred and the report was duly made to the police. He reiterated his argument in the trial court that this action was based on contract and since this theft of the subject matter had occurred, the contract could not be fulfilled due to frustration. The issue posed by the first ground of appeal is whether, in releasing the vehicle, the

subject matter of this suit to M/S Vocational Tours and Travels, the respondent did an act which was outside the terms of the hire agreement with the appellant to amount to wrongful parting with the vehicle. In order to provide an answer to the issue, one has to look at the terms of the agreement signed by both parties which is the hire purchase agreement I set out earlier in this judgment. In my view the terms of the agreement are very clear.

For a consideration of U.Shs.500,000/= the respondent agreed to hire the appellants vehicle for period of thirty days on a self-drive basis. The word “self-drive” has been explained in the. “Cambridge International Dictionary of English” (Low Price Editions> as meaning renting a car which the hirer drives himself rather than being driven by someone else. In my opinion this agreement meant that the respondent or its employee or authorized agent would drive the vehicle for the period of the agreement. I am fortified in this by a further provision in the agreement that the respondent undertook to return the vehicle to the appellant in the condition it was in at the time of signing the agreement. This clearly means that the respondent undertook to remain in exclusive control of the vehicle for a period of thirty days.

Did the conduct of the respondent in relation to the vehicle fall outside the terms of this agreement? In my judgment, the answer is yes. In this case the respondent released the vehicle to a company called Vocational Tours and Travels. This is a completely different entity and a total stranger to the hire agreement. There is no evidence that this company was a driver or an authorized agent of the respondent. In fact the evidence is that, that company also sub-hired from the respondent. This was done without the knowledge or consent of the appellant. As if that was not bad enough Vocational Tours and Travels also went ahead and sub-hired the vehicle to yet another stranger by the name of Sam Nyeko. This stranger was totally unknown to the respondent and the appellant. In my view the chances of the respondent fulfilling its undertaking to return the vehicle in good condition could not be fulfilled when it had no knowledge or control of the people using the vehicle. It cannot be reasonably suggested that the appellant even imagined that the vehicle would be used by people who were not even known to the respondent as was the case here. In my judgment the hire agreement meant that the vehicle would remain under the respondents control through its drivers and authorized agents and would not sub-hire it to other tour companies. I hold therefore that the act of sub-hiring the vehicle to Vocational Tours

and Travel fell totally outside the terms of the hire agreement and was wrongful parting with the vehicle which amounted to conversion on the part of the respondent. But it has been argued that the filed a false claim knowing well that the vehicle had been stolen and has no right to claim the return of the vehicle or its value. I disagree.

In the East African Court of Appeal Case of Charles Douglas Cullen v. Parsram and Hauraj (1962) E.A. 159, Newbold J. A. (as he then was) after an exhaustive examination of the law governing detinue sur bailment and detinue sur trevor (the ancient terms for detinue and conversion) stated at p. 164;

"**In my opinion, where the original possession of the defendant was lawful whether by reason of bailment, quasi contract or statutory right, and there is a continuing duty on his part to retain the article and then to deliver it up to the person entitled to demand it, it is no defence for the defendant to say he no longer has possession of the article, unless he proves that possession was lost without any default on his part"**

In a rather old case of **Ballet v. Mungay (1943) I. K.B 281** the plaintiff lent musical equipment to the defendant on the agreement that the defendant would make weekly payments for the use of the instruments to the p1aintiff. When the plaintiff subsequently demanded the return of the equipment, the defendant could not comply as he had already given them to someone else. The plaintiff sued in detinue for the return or the value of the equipment. It was held (LORD GREENE M.R.) that the defendant was properly sued in detinue in that on receiving the demand to return them, he refused or neglected to do so and failed to prove that in parting with the articles, he had not stepped outside the bailment altogether.

In my judgment, the sub-hiring of the vehicle to M/S Vocational Tours and Travels was an act not contemplated by the agreement signed by the appellant and the respondent. It is this unlawful act of conversion which led to the vehicles falling in the hands of "strangers" to the agreement and its subsequent loss.

In the words of Newbold J.A. in the Charles Douglas Callen Case (supra) he observed at page 162:-

"In detinue sur bailment, refusal to deliver up on the grounds of lack of possession at the

time of the demand has been held in a number of cases not to be a good defence: Jones v Dole (b) 152 ES 9, Coldinan v Hill (7) 1919 1 K.,B. 443. The reason is obvious. As the original possession by the defendant was lawful and as he remained under a continuing duty to deliver up the article to the person entitled to demand it, refusal to deliver up is itself the wrong and not merely evidence of some previous wrong and such wrong refusal cannot be excused on the grounds of an earlier wrongful parting with the possession of the article. As was said in Reeve v. Palmer (8) 141 ES 33, a bailee cannot set up a wrongful act as a defence to a demand and thus by a wrongful act better his portion."

The point here is that in the instant case the respondent cannot show, as was his duty to do, that he was not at fault when he allowed the vehicle out of his control. He therefore remained at all times liable to return to the appellant his vehicle or its value. I agree with the contention raised by the first ground of appeal that the learned trial judge erred when he failed to hold that the respondent sub-hired the vehicle to Vocational Tours and Travels in breach of the hire agreement between him and the appellant. I find merit in the first ground of appeal which I would accordingly uphold.

The second ground of appeal was that the learned trial judge erred when he held that the respondent was not liable in conversion and detinue because he was aware that the subject matter (the vehicle) had been stolen.
I find no merit in this ground of appeal. The right of the appellant for a remedy in conversion and detinue cannot be defeated merely because at some point, the appellant came to know that his vehicle had been stolen in the hands of a stranger to whom the respondent illegally transferred it. The second ground of appeal therefore should succeeds.

The same applies to the third ground of appeal. The respondent by an unlawful act made an illegal transfer of the vehicle to Vocational Tours and Travels which act led to the vehicle being stolen. It is not a defence that the appellant came to know about it. The vehicle was already gone anyway.

The forth ground of appeal was that the learned trial judge erred in holding that the respondent undertaking to return the vehicle in the condition it was in at the time of the hire agreement was

frustrated by the theft. I do not accept the argument advanced by the respondent counsel that this action is based solely on contract and that it is enough defence if the respondent can prove a vitiating factor to the contract such as frustration. The plaint in paragraph three clearly states that the plaintiff was suing for damages for conversion and detinue. This cause of action may be founded on contract but the common law principles on conversion and detinue apply as demonstrated by the case of Charles Douglas Culler (supra) . Be that as it may, even in contract the respondent could not successfully plead frustration where, like in this case, the vehicle was stolen long after it was in breach of the contract by wrongful parting with the vehicle. This ground of appeal therefore should succeed.

In the result I find merit in this appeal which I would accordingly allow, setting aside the trial courts judgment and orders dismissing the appellants suit. I would enter judgment for the appellant for U. Shs. 7.5m being the value of the lost vehicle. Finally I would award the costs of this suit here and in the court below to the appellant.

Dated at Kampala this.11th.day of. November 1998.

A.TWINOMUJUNI

JUSTICE OF APPEAL

JUDGMENT OF MANYINDO DCJ.

I have read the judgment of Twinomujuni, JA and I agree with it. As Engwau, JA also agrees there will be judgment and orders in terms proposed by Twinomujuni J.A.

Dated at Kampala this 11th. Day of November 1998.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

JUDGMENT OF ENGWAU J.A

I had the benefit of reading the Judgment of Twinomujuni, J.A in draft and I entirely agree with it. In the premises, I would allow the appeal with the terms proposed by him.

Dated at Kampala this. 11th day November 1998

S.G ENGWAU

JUSTICE OF APPEAL